

IT FURTHER APPEARING TO THE COURT that Plaintiff filed a motion for default judgment as to Kevin Stills on June 13, 2011; and

IT FURTHER APPEARING TO THE COURT that counsel for Defendant entered an appearance and filed a response to Plaintiff's motion on July 6, 2011; and

IT FURTHER APPEARING TO THE COURT that Defendant alleges his delay in responding to Plaintiff's Complaint is excusable, as Defendant was not properly served with the Complaint. The Process Receipt and Return form indicates that "Sgt. Wronick (SIU-Special Investigations Unit)," an officer in the facility where Plaintiff is incarcerated, was served with the Complaint, and Defendant alleges that the form "does not include any reference by the [serving] U.S. Marshall to the effect that Sgt. Wronick was authorized to accept service on behalf of Stills"; and

THE COURT NOTING that, pursuant to Federal Rule of Civil Procedure 55(b)(2), a court may enter a default judgment against a properly served defendant who fails to plead or otherwise defend an action, Anchorage Assocs. v. V.I. Bd. of Tax Review, 922 F.2d 168, 177 n.9 (3d Cir. 1990); and

THE COURT NOTING FURTHER that a court must consider the following three factors when exercising its discretion to grant default judgment: "(1) whether the party subject to default judgment has a meritorious defense, (2) the prejudice suffered by the party seeking default, and (3) the culpability of the party subject to default," GP Acoustics, Inc. v. Brandnamez, LLC, No. 10-539, 2010 U.S. Dist. LEXIS 84244, 2010 WL 3271726, at *3 (D.N.J. Aug. 17, 2010) (citing Emcasco Ins. Co. v. Sambrick, 834 F.2d 71, 74 (3d Cir. 1987)); and

THE COURT NOTING FURTHER that, "[i]n weighing [the default judgment] factors, [the] district court[] must remain mindful that, like dismissal with prejudice, default is a sanction

of last resort,” Dough Brady, Inc. v. New Jersey Bldg. Laborers Statewide Funds, 250 F.R.D. 171, 177 (D.N.J. 2008) (citing Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 867-68 (3d Cir. 1984)); and

THE COURT NOTING FURTHER that, pursuant to Federal Rule of Civil Procedure 4(m), it was necessary for Plaintiff to serve Defendant within 120 days of filing the Complaint, Fed. R. Civ. P. 4(m); and

THE COURT FINDING that Defendant has presented the meritorious defense that the alleged service of process was untimely and in violation of Federal Rule of Civil Procedure 4(m); and

THE COURT FINDING FURTHER that Plaintiff has not demonstrated that he will suffer prejudice in the event a judgment of default is not granted; and

THE COURT FINDING FURTHER that Defendant has shown a valid excuse—improper service—for his failure to timely answer Plaintiff’s Complaint, and that, therefore, Defendant is not culpable;

IT IS HEREBY ORDERED that Plaintiff’s motion for default judgment is **DENIED**.

Dated: 1/10/2012

/s/ Robert B. Kugler
ROBERT B. KUGLER
United States District Judge